United States Circuit Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

vs.

CERTIFIED SECURITIES, INC., an Oregon Corporation, Appellee,

and

ERNEST SCHULD; OREGON MUTUAL LIFE INSURANCE COMPANY, an Oregon corporation; POLK COUNTY, a municipal corporation and political subdivision of the State of Oregon Defendants.

APPELLEE'S BRIEF

Appeal from the Judgment of the United States District Court, for the District of Oregon.

HONORABLE JAMES ALGER FEE, Judge

W. C. WINSLOW, Attorney for Appellee,
Salem, Oregon

ELLIOTT PRINTING HOUSE, SALEM

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W. C. WINSLOW, Attorney for Appellee,
Salem, Oregon

STATEMENT

A very brief statement will suffice. This involves a condemnation proceeding covering real property in the Camp Adair project. Appellee was the owner of the real property involved. By stipulation, a judgment was entered fixing the amount of damages sustained on account of the taking of the property by the appellant. This was entered March 8, 1943.

The money was paid into court and distributed in accordance with this determination, $10,703.62 of the amount being paid to appellee and the balance to the Oregon Mutual Life Insurance Company on account of a mortgage.

Thereafter and on September 3, 1943, the Court, on the motion of appellant, set aside the judgment determining the damages sustained by appellee on account of the taking of this property. As the record shows, this motion was not served upon appellee. No notice was given to appellee of the hearing. Thereafter appellee was required to file his answer and go to trial, at which trial the jury returned a verdict for $15,700. Judgment was entered on this verdict on May 26, 1944.

While this appeal on the part of the government purports to be an appeal from that judgment, there is no contention that the Court committed any error at the trial which resulted in the entry of this judgment. The real contention urged by the government is that it should not have had the former judgment set aside It is now contending that the subsequent judgment should be reversed because of the error of the Court in setting this former judgment aside on its motion.

It will be appellee's position that the government is estopped from taking this position. It is the contention of appellee that the situation is vastly different here, with the government as the appellant, from that which it would be if the situation were reversed.

PROPOSITION NO. 1

Appellee contends that the appellant is estopped from urging the questions which it is attempting to urge in this case, because of the following facts:

(a) The original judgment herein, and which was set aside September 3, 1943, was set aside on the motion of the appellant.

(b) After said former judgment had been set aside, the appellant herein acquiesced in this ruling of the Court and had said cause set down and tried before the Court and a jury, resulting in the second judgment.

(c) The condition of the record in this case was invited by appellant.

(d) The condition of the record in this case was induced by appellant.

(e) The position of appellant herein in this appeal is entirely inconsistent with that previously assumed by appellant at the time said first judgment was set aside and said cause set down and re-tried and the second judgment obtained.

POINTS AND AUTHORITIES

Although there are exceptional cases, the general rule is that a plaintiff or defendant cannot appeal or prosecute a writ of error from a judgment, order, or decree in his own favor.

3 C.J. 635 and cases cited in note 40.

A party may not only waive his right to appeal or maintain proceedings in error by express agree-

ment or stipulation, but a waiver may also be implied from, or may estopped by, an act or agreement which is inconsistent with such right.

3 C.J. 664 and cases cited in note 10.

If a person voluntarily acquiesces in, or recognizes the validity of, a judgment, order, or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or decree reviewed by an appellate court.

3 C.J. 665 and cases cited in note 16.

An appellant or plaintiff in error will not be permitted to take advantage of errors which he himself committed, or invited or induced the trial court to commit, or which were the natural consequences of his own neglect or misconduct.

5 C.J.S. 173 and cases cited in notes 58, 59, 60, and 61, and in note 25 on page 226.

Where one has assented to or recognized the validity of matters or proceedings not constituting fundamental error, he may not complain thereof in review.

5 C.J.S. 227 and cases cited in note 29.

ARGUMENT

We think that the matters involved here are so clear and the law with reference thereto so well settled that any argument we should make would be entirely superfluous and a waste of good printers' ink. We, therefore, submit that, while, as held by this Court in the cases of Clair v. U.S., 146 Fed. (2) 617, and Shevlin v. U.S., 146 Fed. (2) 613 and 617, the order setting aside the first judgment herein was and is void, nevertheless appellant herein is estopped by its own acts and conduct from now attempting to take advantage of its own wrong.

Respectfully submitted,
W. C. WINSLOW
Attorney for Appellee,
Salem, Oregon